

(2001) 04 RAJ CK 0013

In the Rajasthan High Court

Case No : Civil Writ Petition No. 3233 of 1999

Mecson Marbles Pvt. Ltd.

APPELLANT

Vs

Commercial Taxes Officer

RESPONDENT

Date of Decision : 04-04-2001

Acts Referred:

State Financial Corporations Act, 1951 — Section 29

Citation : (2007) 3 WLN 401

Hon'ble Judges : Rajesh Balia, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajesh Balia, J.—The petitioner was served with a notice Annx.4 dated 10.1.1995 calling upon him to deposit the tax outstanding against M/s. Diamond Marbles Pvt. Ltd. amounting to Rs. 2,40,837 in respect of Assessment Years 1981-82 to 1984-85 on account of dues under the Rajasthan Sales Tax Act as well as the Central Sales Tax Act.

2. The petitioner challenges the said notice, inter-atta, on the ground that the assessing authority has no authority to issue such notice to the petitioner who has purchased the assets of M/s. Diamond Marbles Pvt. Ltd. which included plant and machinery and other assets constituting its industrial unit at an auction held by the Rajasthan State Financial Corporation in exercise of its powers u/s 29 of the State Financial Corporation Act, 1951, because M/s. Diamond Marbles (P) Ltd. has defaulted in paying its dues to it. He relied on principle Laid by the Apex Court in Isha Marbles Vs. Bihar State Electricity Board and Another,

3. In their return, the Assessing Officer has relied on the provision"s of Section 9 of the Rajasthan Sales Tax Act, 1954 and decision of the Karnataka High Court in Alpha Silicones v. ACTO (1990) 77 STC 68 alleging that the petitioner being the transferee of the industrial unit owned by M/s. Diamond Marbles Pvt. Ltd. is liable for the recovery of sales tax dues outstanding against the transferor

company M/s. Diamond Marbles Private Ltd. and the assessments of the later company can be followed in the hands of transferee.

4. The petitioner has also challenged a consequential notice issued u/s 11-A attaching the bank account of the petitioner assessee vide Annx. 5 dated 6.4.1995 which the assessee had with Bank of Baroda, Kankroli Branch.

5. The facts about the transfer of the assets of Diamond Marbles Private Ltd. which are not in dispute are that at an auction held on 29.8.1987 at the instance of the Rajasthan Financial Corporation in exercise of its powers u/s 29, the petitioner purchased the assets compendiously known as the industrial unit owned by M/s. Diamond Marbles Pvt. Ltd. for a sum of Rs. 40 lacs and in pursuance thereof an agreement of sale between Rajasthan Financial Corporation and the petitioner was executed in which the list of assets transferred to the petitioner company was appended as schedule. The petitioner has not purchased any stock-in-trade which was already hypothecated with the bankers of the Diamond Marbles and the assets purchased by the petitioner were free from all encumbrances except charges of the Corporation (RFC & RIICO) and were only subject to the condition that if any there is any outstanding against the Diamond Marbles to Rajasthan State Electricity Board, Public Health Engineering Deptt. and the RIICO shall be cleared by the petitioner. No further liability was passed on to the petitioner. It is, in these circumstances, the petitioner contends that what he has purchased are assets of M/s. Diamond Marbles but not the business of the Diamond Marbles, and therefore, it is not a transferee of the business of the Diamond Marbles within the meaning of Section 9 whether wholly or partly, and therefore, no liability of Diamond Marbles except to the extent undertaken by it under the agreement can be pursued against it as the transferee of the assets of the company.

6. Section 9 of the Rajasthan Sales Tax Act, 1954 reads as under

9. Liability on transfer of business or on discontinuance or dissolution of business of a firm, etc. (1) When the ownership of the business of a dealer liable to pay tax is entirely transferred, any tax payable in respect of such business and remaining unpaid at the time of the transfer, shall be payable by the transferee, as if he were the dealer liable to pay such tax; and the transferee shall also be liable to pay tax on the sale or purchase of goods effected by him with effect from the date of such transfer and shall within 30 days of the transfer, apply for registration unless he already holds a certificate of registration.

(2) When a dealer liable to pay the tax transfers the ownership of a part of his business, the transferor shall be liable to pay the tax in respect of the stock of goods transferred along with that part of his business which is not so transferred, as if the goods have been sold by him, unless the transferee holds a certificate of registration or obtains it within the prescribed period.

A perusal of Section 9 gives no room of doubt that the liability of tax payable under the Act remaining unpaid against a dealer is transferred to other persons

only in case the business of such dealer in its entirety is transferred lock stock and barrel as a going concern and the provision does not apply in case where only the assets owned by the dealer as a part of the business assets are transferred to third parties when the business itself is retained with the dealer. It is also clear from the fact that Sub-section (2) of Section 9 envisages that when a dealer liable to pay tax transfers only the ownership of part of his business then no liability of tax relating to part of business is transferred in proportion to the part of business transferred with part of business retained with the assessee. The only consequence in such case that is envisaged in respect of tax on transfer of the part of stock-in-trade transferred as part of the business. The transferor is made liable to pay sales-tax in respect of the part of stock of goods transferred along with the part of business, as if he has sold the goods independent of the part of business, which in the case of an indivisible transfer of part of business may not have amounted to sale of goods, unless transferee is a registered dealer or obtains such registration within a prescribed period. Sub-section (2) itself does not come into operation where there is no transfer of stocks notwithstanding part of the business or any other asset has been transferred. In the present case, no part of the stocks has been transferred is apparent from Annx. 1 and only transfer has been made on the assets of the concern.

7. Even otherwise, in the case of properties transferred as a result of sale conducted by the State Financial Corporation in exercise of its powers u/s 29, specific provisions have been made under State Financial Corporation Act as to what encumbrances will carry along with such transfers to the transferee and what shall be not so carried; In this connection, reference may be made to Section 29 of the State Financial Corporation Act, 1951, which reads as under:

29. Rights Financial Corporation in case of default--(1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any installment thereof or in meeting its obligations in relation to any guarantee given by the corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

(2) Any transfer or property made by the Financial Corporation, in exercise of its powers under Sub-section (1), shall vest in the transferee all rights in or to the property transferred, as if the transfer had been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of the security held by it as it had with respect to the original goods.

(4) Where any action has been taken against an industrial concern under the provisions of Sub-section (1), all costs, charges and expenses which in the opinion of the Financial Corporation have been properly incurred by it as incidental thereto shall be recoverable from the industrial concern and the money which is received by it shall, in the absence of any contract to the contrary, in discharge of the debt due to the Financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.

(5) Where the Financial Corporation has taken any action against an industrial concern under the provisions of Sub-section (1), the Financial Corporation shall be deemed to be the owner of such concern, for the purposes of suits by or against the concern, and shall sue and be sued in the name of the concern.

8. On the one hand, it envisages the power of the State Financial Corporation to take over the management as well as the possession of the industrial concern indebted to it, along with it also has the right to transfer by way of lease or sale the property of such industrial concern and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation. Therefore, Section 29(1) only envisages transfer of the assets of the industrial concern possession of which has been taken over by it in exercise of power u/s 29 to be dealt with by it: either to be managed by it or to be disposed of by it. The power to transfer the property of the indebted dealer by way of lease or sale is confined to such properties only which are pledged, mortgaged, hypothecated or assigned to the Corporation. The mortgage, hypothecation or assignment can only relate to assets of the debtor, movable or immovable, but does not extend to business as a going concern which includes assets with liabilities. Thus transfer of properties u/s 29 of the State Financial Corporation Act itself does not envisage transfer of business as a going concern. At best it envisages taking over the management of the business of industrial unit for the purpose of carrying on the business with an object to secure better results and recover its dues or alternatively realise its dues by transfer of such assets of the debtor as are pledged, mortgaged, hypothecated or assigned to it. Sub-section (2) of Section 29 of the Act of 1951 further envisages that on transfer of such property u/s 29 shall be as if transfer of the property is by the owner of the property himself and consequences would follow. That is to say if any property so transferred u/s 29 is subject to other encumbrances, the property will carry with it such encumbrances also which follows the property in the hands of buyer but not all the liabilities of the owner which cannot be considered as encumbrances on the property that may follow it. No other liability of the debtor is envisaged to be transferred to the transferee which is not attached with the property.

9. This may be viewed from another perspective. Tax due to State is a debt which is owed by the tax payer to the State. A debt is an obligation or liability of the debtor and not a right of the debtor. Such debt is a right that vest in the creditor to recover the same from the debtor. A property is one which constitutes right of its holder. The property in its concept includes within it every specie of

valuable right or interest, more specifically ownership; the unrestricted and exclusive right to a thing; right to dispose of a thing in every legal way, to possess it; to use it and to exclude others from interfering with such right of enjoyment of property. A debt is not a right but an obligation which can be conferred by the holder of such a right against the debtor as permissible by law. Obviously such being the case, a debt is not transferable by the debtor unless it is so attached with the property that even on its transfer it follows the property to be enforceable against the property, e.g. a charge or a mortgage or a pledge. It may be noticed in this connection that even if there exists an encumbrance, it can only follow the property with which it is attached but it does not become a debt enforceable against the transferee in person. Therefore, ordinarily a debt is not subject matter of "transfer of property" by the debtor so as to transfer the liability to the transferee of the property except otherwise then provided in law. One such instance is where a charge is created on any property for due discharge of such debt, then the debt follows the property. Another instance is Section 9 of the Act of 1954 in question, which envisages a "transfer of business" in its entirety, in which case transferee is made liable for outstanding tax remaining unpaid against the dealer as if he himself is debtor. That is to say in case the business is transferred in its entirety the transferee is not merely liable to such amount to the extent value of assets transferred to him, but liability to recovery is absolute as the defaulting dealer himself. The difference is manifest between the transfer of property subject to any existing encumbrance and "transfer of business" as such without any such existing contractual encumbrance on the business.

10. A distinction has to be made between transfer of a business and transfer of one or more assets of the business. No charge has been created under the Act in the property of the dealer or in the property of the business in respect of outstanding dues against the dealer so as to secure a right to follow the property in the hands of transferee for recovery in case the tax against the dealer remains unpaid.

11. The underlying central idea of a "business" is not an asset but continued exercise of an activity. In the classical of quoted words of Jessel MR in *Smith v. Anderson* (1880) Ch. D. 247, "The word business is one of large and indefinite import and cannotes something which occupies the time, attention and labour of a person normally with the object of making profit.

In *Narain Swadeshi Weaving Mills Ltd. v. CEPT* (1954) 26 ITR 756, a five Judges Bench of the Supreme Court said, The word "business" cannotes some real, substantial and systematic or organized course of activity or conduct with a purpose.

In *The Commissioner of Income Tax, Punjab Vs. The Lahore Electric Supply Co., ,* the Court said, "In short business is an activity capable of producing a profit which can be taxed.

Again, the Apex Court in *Barendra Prasad Ray and Others Vs. Income Tax Officer, "A" Ward, Foreign Section and Others*, considered the meaning of term "Business" in the context of provisions of Income Tax Act, 1961 and said:

The word business is one of wide import and it means an activity carried on continuously and systematically by a person by the application of his labour of skill with a view to earn an income.

The principle was reiterated recently in *CBI v. V.C. Shukla* 1998 SC 1406.

12. In substance the "Business" consist of entire activity of carrying on business. In comparison an asset, whether of such activity business or de hors such activity, concerns the right of ownership vesting in a person which is realisable, used possessed to the exclusion of all others. A business or carrying on activity in its comprehensive senso may itself be the asset of the person who carries on such business, but all assets owned by such person carrying on business, whether used in carrying on such activity or otherwise, do not by itself constitute a business of the owner. In short, ownership of a right cannot be an activity of the person, which he carries on for a purpose, the difference between a business assets and other asset lies only in the purpose to which such asset is or intended to be put to use. This distinction was pointed out by Allahabad High Court in *Banarasi Das Gupta v. CIT* (1977) 106 ITR 567, wherein the Court pointed out that every asset which is once used as a business asset or which is capable of being so used cannot be regarded as a commercial or business asset. In order that an asset must be regarded as a commercial asset, it must be the asset of a running bussiness. In other words, assets once forming part of business asset may cease to be so when activity of carrying on business ceases. The transfer of such assets after the business ceased, cannot even be said transfer of business assets; notwithstanding once it may be the tool with which business was being run.

13. The term "business" though has not been given a definite meaning by a precise definition in the enactment but has been understood to mean an activity of continuity, regularity and permanency as a means of material gains and livelihood, therefore, the transfer of business includes within it not merely a transfer of one or more of the assets which are used in business but is a transfer of an on going activity undertaken for the purpose of making material gains and would include assets of the business, the stock in trade, cash in hand and cash at Bank and so on subject to the liability attached to such business. A transfer of business de hors the liability attached with the business is ordinarily not envisaged. On the contrary, the term "asset" is of much narrower magnitude and denote some kind of property or effects of a person which can be considered to be the means a party has as compared to his liabilities or debts and can be applied in liqudating the liabilities. The two concepts are entirely different. The distinction can be elicited with reference to the decided cases referred to in *Stroud's Judicial Dictionary*.

14. In *re Rhogg, Eastern v. Boyd* 1938 Ch. 828, the bequest of the testator's business was held to be a bequest of the undertaking or enterprise. It will normally include the assets of the business, the stock-in-trade, cash at bank and so on, subject to its liabilities.

On the other hand, in *Katz v. Gordon* 1958 (4) SA 213 the question was about the bequest of all assets of a business and it was held that a bequest of all the assets of a business did not make the beneficiary subject to any of the liabilities.

15. In this connection, in the scheme of the statutory provision it is to be seen that the emphasis is on the transfer of ownership of a business in its entirety and not a transfer of a part of the business or of asset of the business. The pre-condition for invoking Section 9 is transfer of a business in its entirety. The transfer of a part of business or of the one or more the assets of business of the dealer while retaining the business with the dealer or in case the business has already come to a close and does not exist. Section 9 has no application and cannot be invoked. In this connection reference may usefully be made to *Bajranglal v. State of Madhya Pradesh* 16 STC 350. In that case a Division Bench of Madhya Pradesh High Court was considering the like provision as Section 9 of the Rajasthan Sales Tax Act enacted in Section 33 of the M.P. General Sales Tax Act, 1958 using the very same expression viz. "where the ownership of the business of a dealer was entirely transferred." In the said case, the dealer decided to sell the goods lying in his stock in discharge of his debts. The transferees of such goods were sought to be made liable to the remaining unpaid sales tax against the dealer by invoking the said provisions of the transfer of business. The court said:

It will be seen that one of the essential conditions that must be fulfilled before liability for payment of tax can be fastened under the said provision is that the ownership of the business of dealer liable to pay tax must have been entirely transferred. "Business" means an adventure or concern in the nature of trade, and for the purposes of Section 33(1) there must be a transfer of the ownership of "business" as such and not of the goods or material with which the business is carried on.

In connection with this, the Court referred to number of illustrations, viz.; a person can carry on a business and yet may not at a point of time possess stock-in-trade at all or sufficient stock-in-trade. Again a person carrying on a business may sell at one point of time his entire stock and yet continue the business thereafter by acquiring some new stock later on and yet he may in third contingency, after selling the stock-in-trade decide to close his business. In all these cases there is no transfer of business. The Court further held:

The transfer of a business implies the transfer of a running business together with all its rights, liabilities, stock-in-trade and goodwill.

16. The aforesaid conclusion fully fortifies me in that view which I have stated above. This view also accords with the view taken by a learned Single Judge of

this Court in *Kanhaiyalal v. State of Rajasthan* 86 STC 30. That was also a case where action was taken against the transferee for recovery of some dues against the transferor under the sales tax laws which had remained unpaid at the time of transfer. The Court said that it is clear from the provisions of Section 9(1) of the Rajasthan Sales Tax Act, 1954, that the transferee is liable to pay the tax payable in respect of the business of the transferor and remaining unpaid by him if the ownership of the business is entirely transferred and not otherwise. Where there was no finding that the ownership of the business of the dealer had been entirely transferred and the transfer deed showed that the landed property of the dealer alone was transferred but not the running business, i.e., the stock-in-trade, business assets, goodwill and credits and debits, and there was no proof that the petitioner was not a bona fide purchaser without notice of the sales tax proceedings, and the facts showed that his objections to the proceedings for recovery of sales tax dues of the transferor from him had not been decided and no finding that the dues of the transferor were recoverable from the petitioner had been recorded, he was held not liable for the recoveries of the transferor.

I am in respectful agreement with the view taken by the learned Single Judge in the above case.

17. Learned Counsel for the respondent has relied on *Alpha Silicones v. ACTO (Kar.)* 77 STC 68. The decision of the Karnataka High Court is founded on the reason that ownership in the context of the Karnataka Sales Tax Act, 1957 should be interpreted as the assets of the business. In principle, though the Karnataka High Court has not deviated, that in order to invoke the provisions u/s 15(1), there should be transfer of ownership of the business, however has equated the assets of a business with the business in its entirety. It may be noticed that the Karnataka case also arose as a result of transfers made by the State Financial Corporation in exercise of its powers u/s 29 of the State Financial Corporation Act. As already noticed above Section 29 of the State Financial Corporation Act does not authorises the Corporation to transfer the running business of its debtor at all unless it can be said that the entire business was pledged, hypothecated or mortgaged with the Financial Corporation. Financial Corporation under that provision is only entitled to and authorised to transfer and to realise the assets of the debtor which are hypothecated, pledged, mortgaged or assigned to it. No other assets are available for its authority to part with u/s 29. Therefore, the equating of the transfer made by the State Financial Corporation of the assets pledged with the transfer of business as the owner can do in its capacity to run the business for the purpose for material gains or to earn livelihood has no question in order to fulfil the condition to invoke Section 9 of the Act.

With utmost respect, I express inability to agree with the Karnataka High Court.

18. Lastly, it was argued by the learned Counsel for the Revenue that since Section 11-AAAA has been introduced creating a charge over the business assets of the dealer, it must be held that the property transferred to the petitioner in

this case is subject to such charge and liability followed the property in the hands of the transferee. Suffice to say, the transfer had taken place prior to the insertion of Section 11-AAAA in the present case, and the statutory charge envisaged u/s 11-AAAA had not come into picture at all at the time of transfer of the assets in question. The property in question stood transferred prior to creation of charge u/s 11-AAAA, assuming that Section 11-AAAA, results in creating a charge. Moreover, u/s 11-AAAA, the recovery proceedings can proceed only against the properties transferred which have become subject to charge but not against the person or other property of the transferee. There is no foundation to examine further validity of this contention also.

19. As a result, writ petition is allowed. The impugned notices Annx. 4 & 5 are quashed. There shall be no orders as to costs.